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C-408-046
Sunset Review
Public Document

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Ronald K. Lorentzen
Acting Director, Office of Policy

SUBJECT: Issues and Decision Memorandum for the Five-Year ("Sunset")
Review of the Countervailing Duty Finding on Sugar from the
European Community; Preliminary Results

Summary

We have analyzed the substantive responses and rebuttal comments of interested parties in the full sunset review of the countervailing duty finding on sugar from the European Community ("the Community"). We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this full sunset review for which we received substantive responses by parties:

1. Likelihood of continuation or recurrence of countervailable subsidies
2. Net countervailable subsidy likely to prevail
3. Nature of Subsidy

History of the Finding

On July 31, 1978, the Department of Treasury ("Treasury") published in the Federal Register its affirmative finding on the countervailing duty finding on sugar from the Community. See Sugar from the European Community, T.D. 78-253, 43 FR 33237 (July 31, 1978) (Final Determination). The countervailable program cited was the guidance and guarantee fund, pursuant to which restitution payments were made, which was operated under the Common Agricultural Policy ("CAP") of the Community. The net countervailable subsidy determined was 10.80 cents per pound of sugar. The net subsidy was based on the average maximum level of export restitution payments set by the Community for sugar exports under the CAP during the first half of 1978.

The Department of Commerce ("the Department") has completed four administrative reviews and a sunset review of the countervailing duty finding since the investigation. See Sugar From the European Community; Final Results of Administrative Review of Countervailing Duty Finding, 46 FR 46984 (September 23, 1981) for the period of review July 1, 1979 - June 30, 1980, Sugar

From the European Community; Final Results of Administrative Review of Countervailing Duty Finding, 48 FR 35001 (August 2, 1983) for the period of review July 1, 1980 - June 30, 1981, Sugar from the European Community; Final Results of Administrative Review of Countervailing Duty Finding, 49 FR 45039 (November 14, 1984), for the period of review July 1, 1981 - June 30, 1982, Sugar From the European Community; Final Results of Countervailing Duty Administrative Review, 55 FR 35703 (August 31, 1990) for the period of review January 1, 1988 - December 31, 1988, and Final Results of Full Sunset Review; Sugar From the European Community, 64 FR 49464 (September 13, 1999)(First Sunset Review). Since the completion of the first sunset review, no administrative reviews have been conducted by the Department.

On September 13, 1999, the Department published in the Federal Register a notice of final results of the first five-year sunset review of the countervailing duty finding on sugar from the Community, pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"). See First Sunset Review, 64 FR 49464. As a result of that review, the Department determined that revocation of the countervailing duty finding would be likely to lead to continuation or recurrence of a net countervailable subsidy of 23.69 cents per pound of sugar. In accordance with 19 CFR 351.218(e)(4), the Department published a notice of continuation of the finding based on its affirmative finding. See Continuation of the Countervailing Duty Finding on Sugar From the European Community, 64 FR 58033 (October 28, 1999) (Continuation).

Background

On September 1, 2004, the Department published a notice of initiation of the second five-year sunset review of the countervailing duty finding on sugar from the Community, pursuant to section 751(c) of the Act. See Notice of Initiation of Five-Year ("Sunset") Reviews, 69 FR 53408 (September 1, 2004). The Department received notices of intent to participate from the United States Beet Sugar Association, American Cane Sugar Refiners' Association, American Sugar Cane League, Sugar Cane Growers Cooperative of Florida, Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Hawaii Sugar Farmers, and the American Sugarbeet Growers Association (collectively "domestic interested parties"), within the deadline specified in section 351.218(d)(1)(i) of the Department's regulations. Domestic interested parties have been active participants and have consistently opposed revocation of the finding.

The Department received timely substantive responses from domestic interested parties and from the Community. On the basis of responses filed by domestic interested parties and the Community, and in accordance with 19 CFR 351.218(e)(2)(1), the Department conducted a full review of this finding.¹

¹ See Memorandum for Ronald K. Lorentzen, Re: Sugar from the European Commission, October 21, 2004; Adequacy of Response to the Notice of Initiation.

On October 5, 2004, we received rebuttal comments from domestic interested parties within the deadline under 19 CFR 351.218(d)(4). We did not receive rebuttal comments from the Community.

The Department extended the time limit for preliminary results of this sunset review until March 20, 2005, in accordance with section 751(c)(5)(B) of the Act.²

Discussion of the Issues

In accordance with section 751(c)(1) of the Act, the Department is conducting this review to determine whether revocation of the countervailing duty finding would be likely to lead to continuation or recurrence of a countervailable subsidy. Section 752(b) of the Act provides that, in making this determination, the Department shall consider the net countervailable subsidy determined in the investigation and subsequent reviews, and whether any change in the program which gave rise to the net countervailable subsidy has occurred that is likely to affect that net countervailable subsidy. Pursuant to section 752(b)(3) of the Act, the Department shall provide to the International Trade Commission ("ITC") the net countervailable subsidy likely to prevail if the finding were revoked. In addition, consistent with section 752(a)(6) of the Act, the Department shall provide to the ITC information concerning the nature of the subsidy and whether the subsidy is a subsidy described in Article 3 or Article 6.1 of the 1994 WTO Agreement on Subsidies and countervailing Measures ("Subsidies Agreement").

Below we address the substantive responses and rebuttal comments of interested parties.

1. Likelihood of Continuation or Recurrence of Countervailing Subsidy Interested Parties Comments:

Comment 1

Domestic interested parties assert that revocation of the countervailing duty finding would likely result in the recurrence of the importation of subsidized sugar from the Community. See Domestic Interested Parties, Substantive Response, October 1, 2004, at 12. In their substantive response, domestic interested parties argue that in the first sunset review (1998-1999), the Department based its preliminary and final determination on the Community's acknowledgment that the export restitution program remains in place, based on information presented by parties. Id. at 14-15.

² On December 27, 2004, the Department published in the Federal Register notice of the extension of the deadline for the preliminary determination in this proceeding. See Sugar from the European Union, Belgium, France and Germany; Extension of Time Limits for the Preliminary and Final Results of Sunset Reviews of Countervailing and Antidumping Duty Findings, 69 FR 77220 (December 27, 2004). The Department extended the deadline to on or about March 20, 2005. Because March 20, 2005 falls on Sunday, the preliminary results of this full sunset review is due on March 21, 2005.

They note that since the first sunset review no material changes to the facts presented have emerged. Id. at 17. Therefore, domestic interested parties argue that the facts presented here justify a finding that revocation of a finding would result in continuation of countervailable subsidies. Id. at 18.

In further support of the premise that revocation of the finding is likely to lead to continuation of countervailable subsidies, domestic interested parties argue that the Department should not revoke the finding on sugar from the Community for the following reasons: (1) the European Union (“EU”) continues to subsidize exports of sugar, (2) the trend in world pricing continued to place pressure on the intent of the tariff rate quota (“TRQ”), (3) U.S. sugar policy remains in a state of flux, and (4) TRQ and market allotments do not provide justification for revoking the finding. Id. 17-35. Domestic interested parties argue that, consistent with the Statement of Administrative Action (“SAA”), continuation of a program is highly probative of the likelihood of continuation or recurrence of countervailable subsidies if the finding were revoked.

The Community asserts that revocation of the measure is unlikely to have any effect on the U.S. market. The Community argues that the EU’s “Common organisation of the markets in the sugar section” is in the process of being thoroughly revised. See the Community’s Substantive Response, September 30, 2004, unnumbered. They contend that the reform will diminish the level of subsidization found to be likely to continue or recur at the time of the previous investigation. Id. The Community states that they have made commitments under the WTO Agreement on Agriculture to reduce the quantity of sugar exported with refunds and the budget for such exports. Id.

Department’s Position

We agree with domestic interested parties that revocation of the finding is likely to lead to continuation or recurrence of countervailable subsidies. In accordance with section 752(b)(1) of the Act, in determining whether revocation of a countervailing duty finding would be likely to lead to continuation or recurrence of a countervailable subsidy, the Department will consider the net countervailable subsidy determined in the investigation and subsequent reviews, and whether any change in the program which gave rise to the net countervailable subsidy determined in the investigation and subsequent reviews has occurred that is likely to affect that net countervailable subsidy.

Since the original investigation in 1978, the export restitution program has not been terminated. The CAP remains unchanged since the 1998/1999 sunset review and continues to provide guaranteed prices. Furthermore, the CAP is structured as a production control system for quotas, and provides for a system of production levies. These levies are shared by producers at a predetermined ratio. For example, if the cost of disposing the “B” sugar category by export to the world market exceeds the revenues from such levies, then the CAP treasury must absorb these additional costs, and may add the deficit back into the amount to be covered by the levy the following year.

Export restitution program payments are based upon the difference between the “world market” price and the price established by the Community by regulation. There have been changes to the price established by the Community. In the first sunset review, we stated that the changes to the Community prices constituted a program-wide change and that revocation to the finding would be likely to lead to continuation or recurrence of countervailable subsidies. See Final Results of Full Sunset Review; Sugar from the European Community, 64 FR 49464 (September 13, 1999). In this sunset review, based on our analysis of information submitted by parties, official reports confirmed by the Department, and the Community’s acknowledgment that the export restitution payments remain in force as part of the CAP, we find that revocation of the finding on sugar from the Community is likely to lead to continuation or recurrence of countervailable subsidies.

Comment 2

Domestic interested parties note that the pricing of refined sugar in the EU continues to be controlled by an intervention board operating under the EU CAP, as it was during the time of the investigation and in the 1998/1999 sunset review. Id. Domestic interested parties maintain that high domestic prices in the EU, resulting from the operation of that protected market, dictate that sugar imports from the EU would be subsidized, just as they were at the time of the original investigation and past sunset review. Id.

The Community stated that sugar production in the EU is controlled through the establishment of production quotas allocated to the sugar producing Member States of the Community, and that unlike quota sugar, sugar produced in excess of production quotas is not entitled to export refunds and has to be exported without any refund. The Community notes that actual exports to the United States are minimal. Id. Since 2000, the level of export limit has remained unchanged, *i.e.*, 499.1 million € financial limit, and 1,273.500 ton quantity limit. Id. The Community quoted the amount spent on export refunds and levies paid by sugar producers and growers for 2002 and 2003. See the Community’s Response, September 30, 2004, unnumbered. The Community argues that the portion of assistance self-financed through levies (up to 70 percent of the total) should not be considered as a countervailable subsidy under the WTO’s Agreement on Subsidies and Countervailing Measures because no financial contribution is provided by the Government. Id. Furthermore, the Community notes that the Community has made commitments under the WTO Agreement on Agriculture to maximize both the quantity of sugar exported with refunds and the budget for such exports. Id.

In rebuttal comments, the domestic parties argue that the Community admits that a countervailing subsidy presently exists and that the subsidy will continue in the near future. See Domestic Rebuttal, October 5, 2004, at 3. Domestic interested parties note that the most current data submitted by the Community demonstrates that the Community has increased its countervailable subsidies to EU sugar producers by nearly five cents per pound over the subsidy levels found in the prior sunset review. Id. Domestic interested parties maintain that the Community’s reliance on future revisions to its sugar regime is irrelevant to the instant review. See Domestic’s Rebuttal, at 6. With respect to the Community’s proposed sugar regime, domestic interested parties argue that while any lowering of subsidization level in the future as a result of the EU’s proposed reform may be relevant in a future sunset review, it is of no relevance to the current review, given that any

proposed changes to the EU sugar regime have not been implemented, reported and accepted by the WTO. Id. Further, in rebuttal, domestic interested parties assert that the purported self-financing by sugar producers in member states does not meet the statutory requirement for an offset, therefore, the alleged offset is not legally permissible and should be rejected by the Department. Id. In support of its assertion, domestic interested parties contend that the Department's practice has been affirmed on numerous occasions by the courts and is no longer a matter of debate. Id. at 5-6.

Department's Position

The Department cannot determine, based on the limited information provided by the Community, whether the Community's claim of self-financing by sugar producers in Member States meets the statutory requirement for an offset. With respect to the sugar regime being revised, although the Community explained that the sugar regime is in the process of being revised, the evidence on the record shows that the export restitution program continues to exist and there is no way of knowing how, if at all, the regime is ultimately used. We find that as long as the program continues, it is highly probative of the likelihood of continuation or recurrence of countervailable subsidies. Therefore, the Department continues to find a likelihood of continuation or recurrence of countervailable subsidies if the finding were revoked.

2. Net Countervailing Subsidy

Interested Parties Comments

The domestic interested parties argued that, based on information made available to the domestic sugar industry (i.e., the world price of sugar has fallen and continues to fall), the Department should make an upward adjustment to the net countervailing subsidy rate to arrive at a rate that represents the countervailing duty rate likely to prevail if the finding were revoked. See Domestic Interested Parties, Substantive Response, October 1, 2004, at 36-40. Domestic interested parties argue that the Department should find that the net subsidy rate should be at least, or larger than, the rate reported in the first sunset review. Specifically, domestic interested parties stated that the Department should find the rate to be 28.70 cents per pound. Id.

The Community did not comment on the net countervailable subsidy likely to prevail, other than to state that revocation of the measure would not likely have any effect on the U.S. market. See the Community's Substantive Response, September 30, 2004, unnumbered.

Department's Position

The Department normally will provide to the ITC the net countervailable subsidy that was determined in the original investigation because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an finding in place. See Section III.B.1 of the Sunset Policy Bulletin. However, this rate may not be the most appropriate rate if, for example, the rate was derived from subsidy programs which were found in subsequent reviews to have undergone a program-wide change. See Section III .B. 3 of the Sunset Policy

Bulletin. Section 752(b)(1)(B) of the Act provides that the Department will consider whether any change in the program which gave rise to the net countervailable subsidy determination in the investigation or subsequent reviews has occurred that is likely to affect the net countervailable subsidy.

As described in the history of this finding, export restitution payments made under the CAP are a means of guaranteeing sugar producers a stated export price. Export restitution payments are granted when the world price of sugar as established in international markets is lower than the “threshold price” established by the Community. Changes in the world market price are not effectuated by the Community. However, the “threshold price,” the amount of restitution payments to be provided, are determined by the Community, effectuated by regulation, and published in the Official Journal. As such, the changes to the threshold price constitute program-wide changes that the Department may consider in determining the net countervailable subsidy likely to prevail if the finding were revoked.

In this review, we find sufficient cause for the Department to make an exception to the general rule of selecting the subsidy rate from the original investigation. The Community identified its average export refund for marketing years 1999/2000, 2000/2001, 2001/2002, 2002/2003, and 2003/2004.³ Therefore, we agree with domestic interested parties that the Department should determine the net countervailable subsidy rate likely to prevail if the finding were revoked be based on more recent information. However, we disagree with domestic interested parties’ suggested net subsidy rate to report to the ITC.

In their response, domestic interested parties assert that the net subsidy rate likely to prevail if the finding were revoked should be at least, or larger than, the rate reported in the first sunset review which is 23.69 cents per pound, or 28.70 cents per pound based on the refund from the most recent year, 2003-2004. Using the most recent data for one year only, that for 2003-2004, domestic interested parties demonstrated in their rebuttal that the average export refund is 50.89 Euros per 100 kilograms. They contend that the conversion is equivalent to a subsidy rate of 28.62 cents per pound, nearly 5 cents per pound above the amount established in the first sunset review. However, rather than relying on the export refunds for a single year, the Department finds it appropriate to convert the net subsidy rate based on an average of the export refunds for the five years, 1999-2004. See Memo to File: Re: EC Sugar Conversions, March 21, 2004. We preliminarily find that 21.62 cents per pound of sugar is the net countervailing subsidy rate likely to prevail if the finding were revoked.

³ In a telephone conversation, on March 16, 2005, the EC provided to the Department the period used to determine the average marketing year for export refunds for the period 1999-2004. See Memo to the File, March 21, 2005.

3. Nature of Subsidy

Consistent with section 782(a)(6) of the Act, the Department will provide to the ITC information concerning the nature of the subsidy and whether it is a subsidy described in Article 3 or Article 6.1 of the Subsidies Agreement. We note that Article 6.1 of the Subsidies Agreement expired effective January 1, 2000. Export restitution payments on sugar fall within the definition of an export subsidy under Article 3.1 (a) of the Subsidies Agreement.

Preliminary Results of Review

As a result of this review, the Department preliminarily finds that revocation of the countervailing duty finding would be likely to lead to continuation or recurrence of a countervailable subsidy for the reasons set forth in the preliminary results of review. For the reasons set forth in the preliminary results of review, we continue to determine a country-wide net countervailable subsidy in terms of cents per pound. Based on our conversions and information provided by parties, we find the net countervailable subsidy likely to prevail if the finding were revoked is 21.62 cents per pound.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the preliminary results of review in the Federal Register.

Agree _____

Disagree _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

(Date)